

**2013 Collective Bargaining:  
Bargaining for Fiscal Integrity**

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Clemans, Nelson, & Associates, Inc.

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“Before all else, be armed,”  
-Niccolo Machiavelli

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**A. Preliminary Considerations**

1. Pattern Bargaining

IAFF v. City of Bay Village, 03-MED-09-1019 (Pincus)

“Critical to the analysis which follows is a discussion of pattern bargaining and its impact on public sector negotiations, with special emphasis placed on the views held by most seasoned and experienced fact-finders and conciliators. Clearly, pattern bargaining can become a critical feature of any analysis concerning disputed negotiated outcomes. To minimize its importance would destroy the very fiber of public sector dispute resolution and directly violate the guidelines contained in Ohio Revised Code Section 4117.14(G)(7)(a)-(f) ... In a report filed by Fact-finder Dworkin in 1997, he underscored an axiom held by most interest arbitrators, ‘the burden is on the union to prove the necessity of defeating a bona fide pattern.’ An alternative perspective would merely reflect a pedestrian and uninformed view of public sector bargaining ...

This conciliator, based on the analysis contained herein, is therefore unwilling to place undue reliance on Fact-finder [M\_\_\_\_\_]’s finding and recommendations. Her reasoning is clearly defective based upon her misreading and misapplication of Ohio Revised Code Section 4117.14(G)(7)(a)-(f).”

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**A. Preliminary Considerations**

2. Multi-Unit Bargaining vs. Forcing Units to Separate

This is particularly critical for safety forces units where ranking officers have been permitted to either enter into multi-unit agreements or bargain in a multi-unit fashion. There are many times when core issues in this economy are diametrically opposed and having the units together does more damage to our ability to enact needed changes to a bargaining agreement.

- a. Layoff and Abolishment Procedures
- b. Overtime Call-out Procedures

3. The Effect of Non-Bargaining Unit Employees

4. Waiving R.C. 4117.14(G)(1): Contract Extensions

5. Scope of Bargaining Considerations – What Are We Asking For?

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**B. Wage & Compensation Considerations**

1. Potential Options to Consider for Wage Restructuring

- a. Redline all persons above a certain rate and reduce wages across the board;
- b. Two-tier systems (i.e., hired before certain date scale and hired after a certain date scale);
- c. Freeze steps;
- d. Expansion of the wage scale (BACKWARDS)
  - (1) Future increases in the form of steps, not general wage increase to the entire scale;
  - (2) Enhanced effectiveness when coupled with self-funded buyout programs to accelerate departure.
- e. The Self-Funded Buyout Program – Attacking the Fall-out from the DROP Program and Economic Uncertainty
  - (1) Impact on Operational Costs
    - Logjam at the top of safety forces and other operations
    - Older personnel staying longer
    - Higher health care costs
    - More time off; longevity payments; etc.
    - Higher incidents of sick leave usage
    - Propensity for injury increases

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**B. Wage & Compensation Considerations**

1. Potential Options to Consider for Wage Restructuring

- e. The Self-Funded Buyout Program – Attacking the Fall-out from the DROP Program and Economic Uncertainty
  - (2) Impact on Operational Costs
    - 1 year's salary paid over 5 years
    - Leave separation payment paid over 5 years
    - Only works if you are not replacing personnel or you have a negotiated wage schedule that self-funds the buyout – there are diminishing returns the longer participation in DROP; ideal scenario – the employee forgoes DROP altogether or leave between 1-3 years completed
    - Must draft the agreement to account for ADEA and OWBPA issues (e.g., notice and waiver provisions, time periods for consideration, revocation, etc.)

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**D. Insurance Issues**

- Does the language cap the employee's share at a fixed dollar amount?
- Does the language restrict the employer's ability to change carriers?
- Does the language obligate the employer to provide identical or the same level of benefits during the agreement?
- Does the language actually negotiate benefit levels in the agreement, either in the language itself or in an appendix?

Or, in the alternative:

- Does the language create substantial exposure through a cost-sharing arrangement?
- Does the language allow the employer the flexibility to change benefit levels, coverage, and/or carriers mid-term?

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**D. Insurance Issues**

- Does your language provide you with the flexibility to address impending changes under the Affordable Care Act (ACA)?
- Affordability: Coverage cost cannot be more than 9.5% of the employee's household income? This is based on the cost of single coverage at this point. Safe harbor approach in the regulations allows an employer to default to the employee's W-2 wages.
- Spousal Coverage: Under the ACA, an employer is not required to provide spousal coverage. In practical terms this would be a significant attraction and retention issue, but more and more employer's are incorporating "Spousal Carve-Outs" where a spouse has coverage available elsewhere.
- Wellness Programs: Under the ACA, wellness programs are encouraged but in order to qualify the program must have incentive and disincentive components
- Are you an applicable large employer? (i.e., 50 or more FTEs or FTE equivalents)
- How are you offering coverage now? (Only FTEs but FT is anything less than 40 hrs. per week?... Need to make adjustments to operations, scheduling, and staffing to avoid penalties)

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**E. Compensatory Time Issues**

1. Christiansen et al. v. Harris County, 529 U.S. 576, No. 98-1167 (U.S. Sup. Ct., Dec. 2000)

- Nothing in the FLSA or its accompanying regulations prohibits employers from compelling employees to take comp time, even when such a practice is not specifically authorized by an agreement with the employees.
- Employers are free under the Act to control an employee and may also cash out an employee's accumulated comp time balance at any time. (NOTE: Under OPFDF regulations, there is no pension contribution paid on compensatory time liquidation/cash-out.)

2. Mortensen v. County of Sacramento, No. 03-15185 D.C. No. CV-01-00782-GEB (9th Cir. May 24, 2004)

- "Within a reasonable time" does not necessarily equate to the employee getting compensatory time off on the exact date requested ... the focus of what is reasonable should be on the customary work practice of the employer and the agreement with the employee.

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**E. Compensatory Time Issues**

3. Aiken et al. v. City of Memphis, 5 WH Cases 2d 961 (6th Cir. 1999)

- Policy requiring employees to request comp time off at least 30 days in advance with approval subject to the department's ability to maintain appropriate staffing levels did not violate the FLSA because the policy was the direct result of the collective bargaining agreement that existed between the employer and the union. The court found that the agreement specifically set out the "conditions under which an employee can take compensatory time off" and that those conditions included a 30-day advance notice to the employer and that the number of employees requesting off on any particular day was dependent upon the employer's ability to maintain adequate staffing levels.

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**F. Minimum Manning**

1. Manning is Permissive: Manning is not a safety issue! It is a permissive topic of bargaining (not affecting wages, hours, or other terms and conditions of employment), that many unions have been permitted to infringe upon.

- IAFF and City of Chillicothe, 06-MED-05-0626 (Brundige - Fact-finding) (manning/staffing is a permissive topic)
- City of St. Bernard and St. Bernard Firefighters, 04-MED-10-1197 (Goldberg - Conciliation) ("staffing levels, the needs of the community, and safety decisions are within managements' domain")
- City of Delphos and Delphos Prof Firefighters, 92-MED-04-0875 (Sandver - Conciliation) (staffing/minimum manning is a permissive topic under R.C. 4117.08)
- Sandusky County Sheriff/Paramedics and OPBA, 04-MED-05-0620 (Berkholder - Fact-finding) (staffing, use of contingency paramedics is permissive)
- Bazetta Township and Bazetta Police Union, 00-MED-11-1318 (Winters - Fact-finding) (minimum manning is permissive and cannot be taken to impasse ...)
- City of Campbell and Campbell Firefighters Assoc. Local 2998, 03-MED-10-1299 (Wallace-Curry - Conciliation) ("But the subject of manning is not a mandatory subject of bargaining, it is a permissive subject ...")

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**F. Minimum Manning**

1. Manning is Permissive: Manning is not a safety issue! It is a permissive topic of bargaining (not affecting wages, hours, or other terms and conditions of employment), that many unions have been permitted to infringe upon.

- City of Marion v. IAFF Local 379, 09-MED-01-0047 (Binning - Conciliation) ("But the subject of manning is not a mandatory subject of bargaining, it is a permissive subject that the union was able to limit in the past...[the Employer] needs flexibility to address its growing financial changes.")
- City of Upper Arlington v. IAFF Local 152L, 10-MED-09-1165 & 1166 (Babel - Fact-finding) ("The City argument was very strong that this issue is a permissive issue of bargaining, but once in the contract must be bargained ... but the requirement to have four firefighters and three medics at the firehouse is not the safety factor, safety is at the scene ... only one of the comparables used by the Union on the other issues in this contract has this clause ...)
- City of Newark and IAFF Local 109, 10-MED-08-0987 (Stein) The conciliator awarded the employer's proposal to eliminate the minimum manning clause based in large part on the change in the service demands on the fire department. Noting the inefficiency of staffing for fires when fires only represented about 15% of the work, the conciliator (at page 11) quoted Tom Friedman and Michael Mandenbaum, "What Went Wrong with America and How It Can Come Back", Little Brown & Co., "The first rule of holes is, when you find yourself in one, stop digging."

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**F. Minimum Manning**

2. SERB on Manning: SERB has specifically refused to find that it is an unfair labor practice for a union to take its proposal for minimum manning to fact-finding, saying in In re Salem Fire Fighters:

- The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.] (emphasis added in SERB opinion). Once the permissive subject is included in the CBA then the Union has an absolute right to bargain over 'the continuation, modification, or deletion' of this existing provision.'

The upshot of the Salem case is that even if minimum manning is a permissive subject of bargaining, SERB will not stop a union from taking it to the statutory impasse procedures. To remains for the employer to point out the permissive nature of the subject. Thus, we have provided numerous citations to that effect. SERB 2009-002 (10-1-2009), pages 3-11 and 3-12.

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**F. Minimum Manning**

3. Beyond the Permissive Nature of Manning:

- a. Elevation of police/fire above all other township/municipal services
- b. Mandatory overtime irrespective of need
  - City of Girard and OPBA, SERB Case No. 06-MED-10-1198 (McDowell) "(The determination of when overtime is required is something that a public employer must be able to determine ... the interest of the public demands that the Employer have the most basic of management rights restored ... It is unreasonable and irresponsible ... to allow an employee to force an employer into an overtime situation." See also: City of Girard and OPBA, SERB Case No. 07-MED-10-1300 (Stein); City of Girard and OPBA, SERB Case No. 06-MED-10-1300 (Wallace-Curry)
- c. Manning Standards (commonly cited by the IAFF as NFPA 1710):
  - Are not law in Ohio!
  - Allow for an employer to count mutual aid and automatic response agreements to evaluate the number of persons responding to a structure fire.
  - Do not draw a distinction between full-time and part-time/volunteer personnel.

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**F. Minimum Manning**

3. Beyond the Permissive Nature of Manning:

- c. Manning Standards (commonly cited by the IAFF as NFPA 1710):
  - Are based on a structure fire response ... Do you think that there are more or less structure fires occurring in present day versus the past?
  - What have modern day fire operations evolved into... primarily EMS operations? Costs to Staff for the event that is the exception have to be reevaluated, particularly in the face of mutual and automatic aid agreements and given that EMS services can be delivered by private entities. There revenue generated by EMS billing, while significant, will never completely sustain operation for an exclusive full-time department.

(Check your history with the Ohio Fire Marshal's Office – the city of Marion averaged 348 fires and 171 structure fires from 1988–1990; from 2006–2008 the city averaged 141 fires and 64 structure fires.)

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**G. Expanding the Use of Part-time Personnel/Contracting Out**

1. SERB Neutrals:

- OPBA and City of Youngstown, 06-MED-09-0943 (Paolucci) It is accepted that the usage of part-time employees becomes necessary to cover absences and vacations of regular officers. While the threat to the side of the bargaining unit is legitimate, if the employer agrees not to use part-time officers in a way that would reduce the workforce, it becomes more acceptable by being less threatening.
- IAFF local 2850 and City of Eastlake, 07-MED-09-1004 (Simmer) "Recognizing that no credible source flatly rejects the hiring of part-time firefighters and recognizing that 99% of all departments around the country employ them (including every volunteer fire department), this fact-finder recommends the inclusion of the city's proposed language ..."

The fact-finder went on to observe that while the union claims the usage of part-time employees poses a safety risk, that claim is rejected on the basis of:

- There is no definitive evidence to show or support that proposition;
- Part-time employees have historically worked side-by-side with full-time personnel in a number of safety-sensitive occupations, both police and fire, EMTs, paramedics, nursing, medicine, et al. with demonstrated safety impact.
- Many comparable fire units in Ohio municipalities supplement the work force with part-time personnel;
- Many firefighters in this bargaining unit got their start working in a part-time capacity;
- The potential cost savings through the introduction of part-time personnel to reduce overtime costs will free-up monies for use elsewhere.

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**G. Expanding the Use of Part-time Personnel/Contracting Out**

1. SERB Neutrals:

- City of East Cleveland and IAFF, SERB Case No. 06-MED-09-1060 (Byrne): The city's contention that it needs some way to provide services to the citizens ... in a cost effective manner is compelling. Moreover, the union's often stated assertion that they were not trying to maximize overtime, but rather provide quality fire suppression and EMS services to the citizenry must be taken at face value.

2. SERB:

- Lorain City Bd. of Education v. SERB, 40 Ohio St.3d 257 (1988) (usage of non-bargaining unit personnel) The decision to transfer bargaining unit work duties to positions outside of the bargaining unit triggers a mandatory duty to bargain with the union.
- Lakewood v. State Employment Relations Bd., 66 Ohio App.3d 387, 584 N.E.2d 70, 1990 Ohio App. LEXIS 2535 (Ohio Ct. App., Cuyahoga County 1990) The employer must negotiate over a schedule change in firefighters' hours even though the employer had reserved to itself the right to schedule employees in the management rights clause of the collective bargaining agreement. According to SERB a general reservation of the right to schedule was not specific enough to override the union's statutory right to bargain over hours of employment.

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**G. Expanding the Use of Part-time Personnel/Contracting Out**

2. SERB:

In re Madison Local School Dist Bd of Edn., SERB 2009-ALJ-003 (November 9, 2009), affirmed by the Lake County Court of Common Pleas in OAPSE v. SERB, 2010 SERB 4-23 (October 24, 2010). SERB found that an employer did not have a duty to bargain over subcontracting where that issue had been negotiated in a prior round of negotiations. The labor contract, which ran through June 30, 2008, said at Article 1, Section C(2):

The Board [of Education] shall not enter into agreements with private or public contractors, or private individuals, to do work normally performed by employees within the scope of their normal duties, unless the Superintendent or designee first provides (i) Notice of and rationale for the intent to execute such agreements to the Union President and Union Field Representative, and (ii) An opportunity for the Union to discuss the effects of such a decision.

In December 19, 2007, the union received such a letter notifying them of the employer's intent to enter into negotiations with a private contractor for busing, and the employer's rationale. A few months went by.

Time got short. The parties scheduled successor contract negotiations, but the employer told the union that they needed to resolve the subcontracting. The parties scheduled a negotiations meeting that the union cancelled.

The employer again said they needed to resolve the subcontracting by June 2008, at which point, the union asked for a bottom line proposal to avoid the subcontracting and layoffs. They got one.

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**I. Expanding the Use of Part-time Personnel/Contracting Out**

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**J. Layoffs/Reduction Procedures**

1. Determining where and how the reduction will occur

- "By seniority within the affected classification" vs. "by seniority"

2. Retention of more cost-efficient personnel

- Can you retain part-time employees / allow full-time employees to bump?

3. Adding reduction in hours (i.e., furloughs, holiday pay, etc.)

4. Giving Notice

- The shorter the better
- Are displaced employees subject to notice requirements?

5. Is there bumping permitted in your agreement, and, if so, is it structured in such a way as to ensure the integrity of operations?

- Limited bumping within the same classification series
- Limited bumping with qualifications

6. Are there any "holes" in language that might allow the union to challenge a reduction or layoff?

- Compare:
  - "Layoff will be for lack of work or lack of funds ..."
  - "Whenever the Employer determines that there exists a lack of work, lack of funds, or that a reorganization in the operations of the Employer is necessary."

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**J. Layoffs/Reduction Procedures**

7. Mitigating Reduction Costs

- Separation pay in the form of biweekly supplements
- Elimination of UC eligibility if more than weekly benefit amount

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**K. The Dispute Resolution Process**

1. Word About the Hearing Process
  - a. Putting the union at risk / scope of bargaining
  - b. Having issues to lose
  - c. Framing the issues through mediation
2. Fact-finding
  - a. Beyond the standard comparable information (the union's case)
    1. Differential tax rates
    2. Differential revenue streams
    3. Income tax/property tax/other forms of revenue on a per capita/ household/family basis vs. union compensation
    4. Selective use of union comparables vs. standardized presentation
    5. Relative ability to pay; relative standing
    6. Accuracy of data
  - b. Don't argue inability where it doesn't exist ... Instead limited ability linked directly to gains made elsewhere (i.e., quid pro quo); type of enhancement given (i.e., 1-time if anything)
  - c. Reassessing the Labor Market Influence on Public Sector Wages  
 Source Data: Ohio Labor Market Information (LMI)  
 Bureau of Labor Statistics Data (U.S. Department of Labor)

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**K. The Dispute Resolution Process**

2. Fact-finding
  - d. Concepts and Themes
    - Once the pension costs are factored into many traditional clerical occupations that exist in many service-oriented units, you will probably find your personnel in excess of the 90% wage percentile.
    - OAC 4117-9-05(K) The fact-finding panel, in making recommendations, shall take into consideration the following factors ...
      - ....Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to the factors peculiar to the area and classification involved;
    - ....Expand the argument to include applicability to overtime, pension benefits, longevity, merit pay, leaves, etc.
    - (i.e., if the federal government has determined that overtime payments are fairly given for work in excess of a total workweek or cycle ... why should public employees receive excessive daily overtime or include time not worked in the calculation?)

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**K. The Dispute Resolution Process**

2. Fact-finding
  - e. Inability to Pay: In terms of bargaining and negotiations, there are very few times when a public employer can truly demonstrate a complete and utter inability to pay. And in these situations, the biggest mistake that public employers make is that they don't ask for enough.
 

A wage freeze from employees is not a concession if an employer is in a projected deficit situation.

That being said, the question remains, what exactly is an inability to pay? Unfortunately there are not any clear-cut answers to that definition. Based upon several different sources of authority, we can formulate a standard that the employer can utilize if it seeks to make this argument. (Note: Useful for a limited ability to pay argument as well.)

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**K. The Dispute Resolution Process**

2. Fact-finding

c. Inability to Pay:

Establishing the Standard

- (1) R.C. 4117(G)(7)(c) "... the interest and welfare of the public, the ability of the public, the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service." (emphasis added)
- (2) R.C. 124.32(A)(2) "A 'lack of funds' means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of funding for programs..." (emphasis added)
- (3) R.C. 118(A)(2) "It is hereby declared to be the public policy and a public purpose of the state to require fiscal integrity of municipal corporations, counties, and townships so that they may provide for the health, safety, and welfare of their citizens, pay when due principal and interest on their debt obligations, meet financial obligations to their employees, vendors, and suppliers, and provide for proper financial accounting procedures, budgeting, and taxing practices. The failure of a municipal corporation, county, or township to so act is hereby determined to affect adversely the health, safety, and welfare not only of the people of the municipal corporation, county, or township but also of other people of the state." (emphasis added)

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**K. The Dispute Resolution Process**

3. Conciliation

- a. Modification of position; introduction of additional/new items
- b. Record (need a record); previously the 8th District held that the failure to produce was grounds for vacation and rehearing; however, amendment to SERB rules allows for the conciliator's notes to serve as a record; at this point the validity of the administrative rules has not been reviewed
- c. Legal Error
  1. Employer; authority of the employer
  2. Ruling on permissive items that do not fall into the "continuation, modification, deletion" provision of R.C. 4117
- d. Factual error
  1. Deliberate disregard of evidence; manifest weight of evidence
  2. Inaccurate factual data used as basis for recommendations
  3. Union comparables
- e. Changed circumstances; new evidence
- f. Error in reasoning
  1. Conflict with a bargaining pattern
  2. Impact of award

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**K. The Dispute Resolution Process**

4. Fact-finding is Important Even Where Conciliation Is the Final Step

5. So Where Do We Stand.... Is There a Bright Line Standard?

- a. Comparables
- b. Financial Information
- c. Errors in Rationale
- d. Adherence to Statutory Criteria
- e. Sound Reasoning in Collective Bargaining Context
- f. Circumstances underlying the Award
- g. Experience of Neutral
- h. Lack of Rationale

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**L. Parting Thoughts**

An Exchange between New Jersey Governor Chris Christie and a Policeman in the Audience at a Town Hall Meeting 1/29/2011.

- Christie: "A whole bunch of politicians who came before me on the local level and the state level made you promises that they couldn't keep. And they knew they couldn't keep them when they made them. So, I understand you being angry. But I suggest to you, respectfully, don't be angry at the first guy who told you the truth." ....
- Policeman: "I received a 2% increase in my salary 2 weeks ago, and my medical benefits started to come out. Do you know how much my check went up Sir? \$4. How am I supposed to live with that?".....
- Christie: "Here's the difference. You're getting a paycheck. And there are 9% of the people in the state of New Jersey who are not. And if their property taxes continue to go up to continue pay for higher and higher salaries in the public sector, they'll lose their homes. And so, I have to tell you, I understand your frustration about not getting a higher raise. But you go around this room and talk to people who are in the private sector who haven't gotten raises for years, if they've been able to keep their job at all. This is the economic reality we live in now. I wish it was different, but it isn't."
- [http://www.weeklystandard.com/blogs/video-christie-explains-police-officer-why-hell-have-pay-more-health-insurance\\_537449.html](http://www.weeklystandard.com/blogs/video-christie-explains-police-officer-why-hell-have-pay-more-health-insurance_537449.html)

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**Questions???**



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